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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 359

SEATTLE GAS COMPANY, A CORPORATION, APPELLANT,

vs.

THE CITY OF SEATTLE, A MUNICIPAL CORPORATION, APPELLEE.

STATEMENT AS TO JURISDICTION ON APPEAL.

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, Section 1 (43 Stat. 937), provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "SEC. 237. A final judgment or decree in any suit in the highest court of a state in which a decision in a suit could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or

laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such state court, and may in its discretion award execution or remand the cause to the court from which it was removed by the writ."

Under the Act of January 31, 1928, as amended by the Act of April 26, 1928, the writ of error was abolished and appeal is now the proper remedy (U. S. C. A., Title 28, Sec. 861*a*; Supreme Court Rule No. 46).

B.

Statute of the State the Validity of Which is Involved.

The validity of a taxing ordinance of the City of Seattle, a municipal corporation, existing under and by virtue of the laws of the State of Washington is involved. The ordinance is numbered 62662. The pertinent provisions thereof are:

"ORDINANCE No. 62662.

An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties.

Be it ordained by the City of Seattle as follows:

SECTION 1. *Exercise of Revenue License Power.*—The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

SECTION 2. *Definitions.*—In construing the provisions of this ordinance, save when otherwise plainly

declared or clearly apparent from the context, the following definitions shall be applied:

Gross Income.—The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like), and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

* * * * * * *

SECTION 3. '*Occupation License*' *Required.*—After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an 'Occupation License.'

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his 'Occupation License' so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

* * * * * * *

SECTION 5. *Occupation Subject to Tax—Amount.*—There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against the gross income, as follows:

(*a*) • • •

(*b*) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

• • • • • • •

SECTION 6. *City of Seattle Subject to Tax.*—Subdivisions (*b*) and (*c*) of Section 5 shall, so far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance.

• • • • • • •

SECTION 15. *Taxpayer to Keep Books and Records—Returns Confidential.*—It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the city comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the city comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the mayor, the corporation

counsel, the city comptroller, or his authorized agent, and members of the city council.

SECTION 16. *Comptroller to Investigate Returns.*—If any taxpayer fails to apply for license or make his return, or if the city comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpœna to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpœna, require him, or any person, to bring with him such books, records and papers as may be necessary.

* * * * * * *

SECTION 24. *Penalty.*—Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the city comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the city jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment."

C.

The date of the judgment sought to be reviewed is June 14th, 1933.

The petition for allowance of an appeal is presented on the 19th day of June, 1933.

D.

Nature of Case and Ruling Below.

The appellant, Seattle Gas Company, as plaintiff brought the action in the Superior Court of the State of Washington for King County, to enjoin defendant, The City of Seattle, from collecting from appellant the license tax prescribed by Ordinance No. 62,662, and to restrain any attempt by the city to enforce the ordinance and its penalties against appellant; and (2) to recover from appellee the sum of $5,500.66, with interest upon the sum of $1,000 at the rate of 6 per cent per annum from July 1, 1932, and upon the further sum of $4,500.66 at said rate of interest from July 11, 1932, which amount appellant paid to appellee as the first monthly installment of the ordinance tax.

The case was decided upon a demurrer interposed by appellee to the amended complaint, and the complaint alleged, among other things:

That appellant is a public utility corporation organized under the laws of the State of Washington and as such since 1904 has been and is engaged in the manufacture and sale of gas in the City of Seattle and adjacent territory (Paragraph I).

That appellant was at all times mentioned in the complaint the lawful owner and holder of two operating franchises granted by the City of Seattle, both of which are in full force and effect, and under each of which appellant is authorized to sell gas to the inhabitants of the City of Seattle and to construct, maintain and operate the necessary apparatus and equipment (Paragraph VII).

That appellee is a municipal corporation of the State of Washington. In its proprietary capacity and for profit, it

has for many years been engaged in the business of selling and furnishing electric light and power to the inhabitants of the City of Seattle for the same purposes for which the appellant sells gas, all in strict and keen competition with appellant (Paragraphs II and VII).

The appellee has sole and exclusive power to fix and determine the rates at which it sells electricity to its customers and is in no wise regulated by the State of Washington or its department of public works (Paragraph III).

On the other hand, appellant is subject to the exclusive control and regulation of the department of public works (Paragraphs III and IV).

The property of the appellee used by it in its electric business is exempt from all city, county and State taxes (Paragraph III).

Appellant is required to pay annual taxes for State, county and city purposes upon all of its property, including its franchises granted by the appellee used in its business in the amount of many thousands of dollars (Paragraph IV).

The appellee at all times mentioned in the complaint has been actively engaged in soliciting customers, actual or potential, of the appellant to cease the use and purchase of gas from appellant and to substitute therefor electricity sold by the appellee, by reason of which appellant is obliged to sell and supply more heat units at a given price than are supplied by the appellee to the public for the same price (Paragraph V).

The City of Seattle has financed its proprietary electric light and power business by the sale of revenue bonds in amounts in excess of thirty million dollars. The principal and interest of said bonds are payable only out of the gross revenues of the city's light and power business. Such bonds are by the law of the State of Washington and by the ex-

press terms of each of said bonds prior liens upon the city's entire gross revenue from its light and power business—taking precedence even over operating charges (Paragraph IX).

After alleging the enactment of Seattle Ordinance No. 62,662 (Paragraph XII) and the payment by appellant under protest of the first monthly installment that would be due thereunder if said ordinance were valid and enforceable as to appellant, the amount of said monthly payment being $5,500.66, it is alleged that by said ordinance appellee is not required to pay the license fee or tax therein specified out of revenues received by appellee from its proprietary business of selling electric light and power, or at all, and that the ordinance is in no respect enforceable against appellee (Paragraph XIV) and does not impose any such tax upon appellant's competitor, namely, the City of Seattle.

The validity of the ordinance in its application to appellant was challenged *inter alia* upon the following grounds:

Appellant charged that under the facts alleged, in its application to appellant, the ordinance (1) would be repugnant to the Fourteenth Amendment to the Constitution of the United States in that the enforcement thereof against appellant would deny appellant equal protection of the law and deprive appellant of its property without due process of law; and (2) would be repugnant to Article I, Section 10, of the Constitution of the United States, in that such application to appellant would impair the obligation of the operative franchise contracts between appellant and appellee; and (3) would constitute an oppressive and confiscatory exercise by appellee of a governmental power of taxation in aid of its proprietary business of selling electric light and power for profit; and (4) would constitute an appropriation and would result in a spoliation of plaintiff's

property without compensation; and (5) would constitute unlawful and oppressive discrimination in that the ordinance tax would be exacted of appellant but would not be exacted of appellant's competitior, the City of Seattle, which is engaged in highly competitive business in a proprietary capacity for profit.

The validity of the ordinance was also challenged as repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States because Section 2 of the ordinance, and particularly the definition of "gross income" therein, is vague, indefinite and uncertain with respect to the amount of the tax to be paid and the method by which the amount may be ascertained to an extent that men of "common intelligence must necessarily guess at its meaning and differ as to its application."

Appellee demurred to appellant's amended complaint. The trial court sustained the demurrer and entered a judgment dismissing plaintiff's action. Upon appeal by plaintiff to the Supreme Court of Washington, which is the highest court in the State of Washington in which a decision in the suit could be had, the validity of the ordinance was by said court sustained and the judgment entered by the trial court was affirmed.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal:

King Mfg. Co. v. *Augusta*, 277 U. S. 100;

Eclipse Mill v. *Department of Labor & Industries*, 277 U. S. 135.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

Respectfully submitted,

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